

FILED UNDER SEAL

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

**IN RE MUSHROOM DIRECT
PURCHASER ANTITRUST
LITIGATION**

THIS DOCUMENT RELATES TO:

All Actions

Master File No. 06-0620

**Nos. 06-0638; 06-0657
06-0677; 06-0861
06-0932; 06-1464
06-1854; 06-3523
06-4829**

**CERTAIN DEFENDANTS' MEMORANDUM IN OPPOSITION
TO DIRECT PURCHASER PLAINTIFFS' MOTION
FOR SANCTIONS AGAINST DEFENDANT, M.D. BASCIANI,
AND NON-PARTY, BASCIANI FOODS, INC. FOR SPOILIATION**

I. INTRODUCTION

Direct Purchaser Plaintiffs ("Plaintiffs") have moved for sanctions for alleged spoliation and other discovery violations on the part of Basciani Foods Inc. ("BFI"), which is not a party to this litigation and defendant M.D. Basciani & Sons, Inc. ("M.D. Basciani"). The motion arises from alleged violations of the Court's January 31, 2012 Order ("Order"). The Order required non-party BFI to produce, *inter alia*, transactional sales records (presumably copies of invoices) for fresh agaricus mushrooms during the time period 1999 through 2008. Plaintiffs claim that after the Court entered the Order, BFI's counsel advised plaintiffs' counsel for the first time that BFI had discarded the records for the 1999 through 2002 time period pursuant to BFI's document retention policy.

BFI has separate counsel from Defendant M.D. Basciani and both companies have separate counsel from the below-identified defendants. (hereinafter “Respondents”). Plaintiffs seek to impose sanctions on M.D. Basciani on the theory that because, among other facts, BFI and M.D. Basciani have common ownership, BFI wrote checks to pay M.D. Basciani’s EMMC membership dues, and Michael Basciani testified that BFI “had to try to follow” the EMMC minimum pricing policy, M.D. Basciani had the legal obligation and duty to prevent BFI from discarding the transactional sales documents for part of the time period at issue in this litigation.

Respondents take no position on Plaintiffs’ arguments or the application of sanctions under Fed. R. Civ. P. 37 to the facts at hand. However, Respondents, who have had no prior involvement in the discovery disputes between plaintiffs and the Basciani entities, oppose one of plaintiffs’ proposed sanctions, namely Plaintiffs request for an Order:

establishing (a) that the quantities of fresh agaricus mushrooms sold by [BFI] for the period January 1, 2001 through January 1, 2003 are the annual quantities reported by M.D. Basciani to the EMMC for the purposes of calculating its dues; and (b) from on or about February 4, 2001 through January 1, 2003, all fresh agaricus mushrooms sold by [BFI] were sold at or above the minimum prices set by the EMMC.

See Plaintiffs Memorandum (‘Plfts’ Mem.’) at p. 20 and Proposed Order at p. 1.

This requested sanction (1) punishes Respondents and the other defendants who had no knowledge of or participation in the alleged discovery violations; (2) is unfairly prejudicial to Respondents and the other defendants because it would preclude them from asserting defenses otherwise available to them; (3) would unfairly prejudice Respondents and other defendants because in a joint trial it would lead to the false conclusion BFI and other EMMC members followed the EMMC minimum pricing policy; and (4) is inappropriate because the record, which shows aggressive price competition by BFI and other defendants, directly contradicts the

proposed “facts” that Plaintiffs ask the Court to conclusively establish. Therefore, the Court should deny this aspect of plaintiffs’ requested relief.¹

II. ARGUMENT

A **Plaintiffs’ Request for Conclusive Determinations as to the Amount of Mushrooms Sold by BFI and the Prices at Which BFI Sold These Mushrooms Would Unjustly Prejudice the Respondents**

In connection with this motion for sanctions for alleged discovery abuses, Plaintiffs seek, *inter alia*, the drastic sanction of conclusive determinations in plaintiffs’ favor with respect to a number of critical factual issues in this case. Plaintiffs are not entitled to this sanction as it would prejudice Respondents, who have no culpability for the alleged discovery abuses at issue.

As an initial matter, there is a strong presumption against entering sanctions that decide the central issues of a case. *See Poulis v. State Farm Fire and Casualty Co.*, 747 F.2d 863, 867 (3d Cir. 1984). This is all the more so where the proposed sanction against the alleged violator would prejudice the defense of other innocent parties. *Remington Prods., Inc. v. Am. Phillips Corp.*, 107 F.R.D. 642 (D. Conn. 1985). *Letelier v. Republic of Chile*, 748 F.2d 790, 795 n.2 (2d Cir. 1984) (party not subject to sanctions because of the failure of another party to comply with discovery, absent a showing that the other party controlled the actions of the non-complying party); *Donato v. Fitzgibbons*, 172 F.R.D. 75 (S.D.N.Y. 1997). (separate trials required to avoid prejudice to party not at fault). *See also Schindler Elevator Corp. v. Otis Elevator Co.*, 2011 WL

¹ It also bears mention that other documents and records appear to be available from BFI that would allow Plaintiffs to ascertain the customers who purchased mushrooms during this time period, as well as other information that would enable the calculation of the prices at which the mushrooms were sold to these customers during this time period. *See* Memorandum of January 31, 2012 at pp. 3-4 describing the documents to be produced by BFI. Item number 1 apparently relates to the transactional sales documents, only some of which were apparently discarded. *But see* items 2-6 and 11 relating to the identity of customers, sales reports, revenues, expenses, etc. which are still apparently available for review and copying by Plaintiffs as well as the defendants in this litigation. For this additional reason, it would appear that Plaintiffs’ request that certain facts be conclusively established would be inappropriate.

4594225 (D.N.J. Mar. 24, 2011), 2011 WL 4954958 (D.N.J. Sept. 30, 2011) (certain facts presumed, but only when no other way to avoid prejudice to moving party, but presumption rebuttable by non-culpable party)

Here, the defendants' pricing policies and procedures with respect to the prices that plaintiffs and putative class members paid for *Agaricus* mushrooms, the total quantities of mushrooms that defendants sold, and the overall market for these mushrooms are central issues in this case. This is so both with respect to the ultimate merits as well as with respect to the certification of this case as a class action.

In their motion, plaintiffs contend that BFI and/or M.D. Basciani failed to produce, and actually discarded certain transactional sales data requested by a subpoena directed to the non-party, BFI. Plaintiffs argue the information sought is relevant to establish the pricing policies of BFI.

Defendants agree that this information is relevant to this matter. Indeed, because BFI's price cutting behavior is so helpful to Respondents' case (*see* Section II (B) *infra*), Respondents are equally interested in obtaining the information at issue. However, Plaintiffs do not contend that Respondents have any culpability for the alleged spoliation and discovery abuses that Plaintiffs claim occurred here. Moreover, the information about BFI's sales volume and pricing is available from other sources.² Yet, Plaintiffs' proposed relief would prejudice Respondents' defense of this case because it would preclude them from showing that BFI actually sold

² For example, Michael Basciani testified about pricing to specific customers. *See e.g.*, transcript at 258, 285-86, 301-303. Presently fact discovery relevant to class certification and the merits of plaintiffs' claims remains open. All parties are free to obtain additional facts from BFI and its customers regarding the volume of fresh *agaricus* mushrooms sold to fresh market customers by BFI and the net prices paid for these mushrooms. Respondents intend to pursue discovery of this information with equal vigor as the Plaintiffs and presumably, the numerous other documents that BFI has been ordered to produce will shed light on these issues (*See* Memorandum of January 31, 2012 at pp. 3-4, items 2-6 and 11).

mushrooms at net prices substantially below the EMMC's suggested minimum prices throughout the proposed class period. Plaintiffs' requested relief is therefore improper.

The *Remington* case is particularly instructive here. In *Remington*, an antitrust action, the court crafted sanctions to avoid prejudice to two alleged Sherman Act conspirators who provided discovery and had no part in the discovery violations by their co-defendant. *See id.*, 107 F.R.D. at 657.

The Court should reach a similar result here. Regardless of whatever merit attaches to Plaintiffs' request for sanctions against BFI and M.D. Basciani,³ Plaintiffs are not entitled to preclude Respondents and the other innocent co-defendants from contesting any disputed issues at trial.

A. Plaintiffs Seek Conclusive Factual Determinations that Contradict the Record Evidence and to Which Plaintiffs Would Not Be Entitled Had the Requested Discovery Been Produced.

Plaintiffs' request for conclusive factual determinations is improper for another critical reason. The proposed determinations contradict the record, which shows BFI's vigorous price competition against the other defendants in connection with agaricus mushroom sales.

The United States Court of Appeals for the Third Circuit has noted that in order to obtain a sanction precluding a party from contesting facts or issues due to the destruction of evidence, the moving party must come forward with plausible, concrete suggestions as to what the destroyed evidence would have shown. *Schmidt v. Milwaukee Elec. Tool Corp.*, 13 F. 3d, 76, 81.

³ It bears mention that the Court entered the Order against BFI only, and not Basciani, and while Plaintiffs purportedly rely upon Rule 37(b)(2)(A)(i) in support of their request for sanctions, the Court may not rely upon that Rule to impose sanctions on a non-party. *See General Insurance Co. of America v. Eastern Consolidated Utilities, Inc.*, 126 F.3d 215, 220 (3d Cir. 1997).

Courts should not impose sanctions where the movant's claim as to what the destroyed evidence would have shown is speculative. *Id.* at 79-81.

Here, plaintiffs would have the Court determine that BFI adhered to the EMMC's minimum pricing policies. Yet there is substantial evidence that this simply did not happen. To the contrary, during his deposition Mr. Basciani testified that BFI did not abide by the EMMC's minimum pricing policies, because to do so would have jeopardized BFI's business.⁴ Indeed, in a brief filed on November 11, 2009 in opposition BFI's motion to quash or modify the subpoena,

⁴ The following are samples of the Mr. Basciani's deposition testimony on this issue:

- Q. Were there times when Basciani Foods had to sell mushrooms at prices lower than the EMMC target price or minimum price during the 01 through 05 period?
- A. There was times that I bought mushrooms higher and had to sell them lower, which I wouldn't have lasted too long. So yes there was.
- Q. Was it necessary to keep a customer to sell at lower than the EMMC minimums?
- A. Yes.
- Q. How frequently would that occur during a given year between 2001 and 2005?
- A. My customers mean everything to me. A customer is always right. So I'm there to service the customer. It's very hard to get a customer that pays their bills. So it's frequent you know.
- Q. Do you know if other members of the EMMC did likewise with respect to selling below the EMMC minimums when it was necessary to keep a customer?
- A. Yes.
- Q. Did they?
- A. Yes they did.

Basciani Dep. Trans. pp. 287-288 attached hereto as Exhibit "A".

- Q: Did you let the other members of the EMMC know that you were regularly selling at non-EMMC prices?
- A: I let them know that the EMMCGA is something that I was against and that it not right. You cannot take these customers from me. It wasn't fair. It wasn't fair. So, I voiced my opinion, yes, I did several times.
- Q: ... I'm asking you whether or not you came into a meeting and ever said, hey, guys, I just want you to know that I don't agree with the EMMC prices and I'm not selling at EMMC prices and all these customers I have over here I'm not selling at EMMC prices. Did you ever tell them that?
- A: I tried my best to explain to them that, yes, you know, I can't abide by this, I'm sorry. It would damage my company. It would make me go out of business.

Basciani Dep. Trans. pp. 302-03 attached hereto as Exhibit "A".

and in a more recent brief filed on November 22, 2011, Plaintiffs acknowledge that Michael Basciani testified that BFI did not follow the EMMC minimum prices. In note 4 of both briefs Plaintiffs state that: "Significantly, Michael Basciani suggested at several points of his deposition that Basciani Foods did not always follow EMMC minimum pricing." (citing portions of Michael Basciani's deposition transcript). Plaintiffs relied on other portions of Mr. Basciani's testimony to support their motion for sanctions. (*See* Plfts' Mem. at p. 4). But interestingly, they studiously omitted other portions of Mr. Basciani's testimony that substantially undermine the validity of their requested relief.

Moreover, testimony from other defendants' representatives about the prevalence of widespread price cutting was to similar effect.⁵ Thus, the record belies Plaintiffs' contention that the allegedly discarded documents would have shown that BFI sold its mushrooms at or above the EMMC minimum prices. For this reason as well, Plaintiffs' effort to gain a conclusive factual determination on these issues should be denied.

⁵ *See*: Ciarrocchi Dep. Trans. pp. 166-67 (minimum pricing abandoned because it was not working); Meya Dep. Trans. pp. 213-14. (minimum pricing did not work); Phillips Dep. Trans. pp. 205 (minimum pricing abandoned because "too many people cheating."); Marson Dep. Trans. pp. 93-96 (disputes regarding EMMC members not abiding by the EMMC minimum pricing policy were common). Excerpts from deposition transcripts collectively attached as Exhibit "B" *See also* Phase I testimony Defendants Responses to Plaintiffs' Statement of Undisputed Facts In Support of Plaintiffs' Motion for Summary (Document No. 274) at pp. 8-12.

III. CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Court deny Plaintiffs' Motion for Sanctions for Spoliation insofar as it seeks an Order that any facts are conclusively determined for the purposes of this case.

Respectfully submitted,

/s/ William A. DeStefano

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EXHIBIT "A"

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1 IN THE UNITED STATES DISTRICT COURT
 2 FOR THE EASTERN DISTRICT OF PENNSYLVANIA

3

) MASTER FILE NO.
4 In Re: MUSHROOM DIRECT) 06-0620
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5 PURCHASER ANTITRUST)
) 06-0638; 06-0657;
6 LITIGATION) 06-0677; 06-0861;
) 06-0932; 06-1464;
7) 06-1854
8 THIS DOCUMENT RELATES TO)
)
9 ALL ACTIONS)

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13 Videotaped deposition of

14 MICHAEL BASCIANI, SR., taken pursuant to

15 notice, at the Law Offices of Reger, Rizzo,

16 Kavulich & Darnall, LLP., Cira Centre, 13th

17 Floor, 2929 Arch Street, Philadelphia,

18 Pennsylvania 19104, on Thursday, January

19 17th, 2008, beginning at approximately 10:30

20 a.m., before David Walsh, Registered

21 Professional Reporter and Notary Public, and

22 Richard Kanzinger, Jr., Videotape Operator,

23 there being present:

24

25 - - -

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<p style="text-align: right;">286</p> <p>1 make them at the EMMC minimum FOB price or the</p> <p>2 willing buyer, willing seller price?</p> <p>3 A. I answered that before.</p> <p>4 Q. Okay.</p> <p>5 A. That it might have been certain, not all</p> <p>6 of the mushrooms. So, yes, if I did sell one</p> <p>7 mushroom at one time at the EMMC prices, then</p> <p>8 that would be yes.</p> <p>9 Q. How frequently did you sell mushrooms to</p> <p>10 these companies during the period '01 through</p> <p>11 '05?</p> <p>12 MR. LIVINGSTON: Object to</p> <p>13 form.</p> <p>14 BY MR. DeSTEFANO:</p> <p>15 Q. Go ahead, you can answer.</p> <p>16 A. They were my customers all the time.</p> <p>17 They were good people.</p> <p>18 Q. All right. Was it more frequent that</p> <p>19 you sold to them at the willing seller,</p> <p>20 willing buyer price or the FOB minimum EMMC</p> <p>21 price?</p> <p>22 A. Willing seller, willing buyer.</p> <p>23 Q. Did you ever get sanctioned or penalized</p> <p>24 or fined or reprimanded for making those sales</p> <p>25 at the willing seller, willing buyer price to</p>	<p style="text-align: right;">288</p> <p>1 EMMC target price or minimum price during the</p> <p>2 '01 through '05 period?</p> <p>3 A. There was times that I bought mushrooms</p> <p>4 higher and had to sell them lower, which I</p> <p>5 wouldn't have lasted too long. So, yes, there</p> <p>6 was.</p> <p>7 Q. Was it necessary to keep a customer to</p> <p>8 sell at lower than the EMMC minimums?</p> <p>9 A. Yes.</p> <p>10 Q. How frequently would that occur during a</p> <p>11 given year between 2001 and 2005?</p> <p>12 A. My customers mean everything to me. A</p> <p>13 customer is always right. So, I'm there to</p> <p>14 service the customer. It's very hard to get a</p> <p>15 good customer that pays their bills. So, it's</p> <p>16 frequent, you know.</p> <p>17 Q. Do you know if other members of the EMMC</p> <p>18 did likewise with respect to selling below the</p> <p>19 EMMC minimums when it was necessary to keep a</p> <p>20 customer?</p> <p>21 A. Yes.</p> <p>22 Q. Did they?</p> <p>23 A. Yes, they did.</p> <p>24 Q. And in your view, how frequent was that?</p> <p>25 MR. LIVINGSTON: Object to</p>
<p style="text-align: right;">287</p> <p>1 either Gourmet, Elite, Creekside, Quincy or</p> <p>2 Money's?</p> <p>3 A. No.</p> <p>4 Q. Did you ever hear of any other EMMC</p> <p>5 member getting sanctioned, fined, reprimanded</p> <p>6 or disciplined in anyway for making a sideways</p> <p>7 sale to a non-member at the willing seller,</p> <p>8 willing buyer price?</p> <p>9 MR. LANDAU: Objection.</p> <p>10 BY MR. DeSTEFANO:</p> <p>11 Q. You can answer.</p> <p>12 A. If they did, there wouldn't be anybody</p> <p>13 sitting at the table because everybody was</p> <p>14 doing it, so no.</p> <p>15 Q. Would you also sell mushrooms to Mario</p> <p>16 Cutone after he resigned from the EMMC?</p> <p>17 A. Yes, I did.</p> <p>18 Q. And were those at the willing seller,</p> <p>19 willing buyer price mostly or mostly the FOB</p> <p>20 minimum EMMC pricing?</p> <p>21 A. If I sold one mushroom at the FOB, I</p> <p>22 would say, mostly willing buyer, you know what</p> <p>23 I mean? You know, a mixture of both.</p> <p>24 Q. Were there times when Basciani Foods had</p> <p>25 to sell mushrooms at prices lower than the</p>	<p style="text-align: right;">289</p> <p>1 the form.</p> <p>2 BY MR. DeSTEFANO:</p> <p>3 Q. What was your understanding of the</p> <p>4 frequency of that?</p> <p>5 MR. LIVINGSTON: Same</p> <p>6 objection.</p> <p>7 MS. ALBANI: You can answer.</p> <p>8 BY MR. DeSTEFANO:</p> <p>9 Q. You can answer.</p> <p>10 A. Say it again, sir.</p> <p>11 Q. How frequently do you understand other</p> <p>12 members of the EMMC had to sell below the EMMC</p> <p>13 minimum price in order to keep a customer?</p> <p>14 A. In order to keep a customer or stay in</p> <p>15 business?</p> <p>16 Q. Or stay in business.</p> <p>17 A. I mean, you know, you had to stay in</p> <p>18 business. You know, what are you going to do,</p> <p>19 thumb in the field. So, it was frequently.</p> <p>20 Q. At some point were the minimum</p> <p>21 pricing -- was minimum pricing abandoned by</p> <p>22 the EMMC?</p> <p>23 A. Yes, it was.</p> <p>24 Q. Do you recall when that was?</p> <p>25 A. Right at the end where I got out. Right</p>

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<p style="text-align: right;">302</p> <p>1 Do you recall that?</p> <p>2 A. Yes.</p> <p>3 Q. Okay. And earlier you testified that</p> <p>4 you were committed to the organization, the</p> <p>5 EMMC, correct?</p> <p>6 A. Correct.</p> <p>7 Q. But yet you were more often than not</p> <p>8 selling at non-EMMC prices; is that correct?</p> <p>9 A. Well, a very small portion of the</p> <p>10 product. I mean what are you supposed to do,</p> <p>11 go out of business, throw in the field?</p> <p>12 Q. I'm not asking you what -- I'm just</p> <p>13 asking you if that's true or not. Is that a</p> <p>14 true statement or not?</p> <p>15 A. Yes.</p> <p>16 Q. Okay.</p> <p>17 VIDEO OPERATOR: I need to</p> <p>18 change tapes. This completes videotape</p> <p>19 number three, the time is 6:17.</p> <p>20 We are now off the record.</p> <p>21 (Whereupon, the testimony was</p> <p>22 taken down by the court reporter only.)</p> <p>23 BY MR. LIVINGSTON:</p> <p>24 Q. Did you let the other members of the</p> <p>25 EMMC know that you were regularly selling at</p>	<p style="text-align: right;">304</p> <p>1 and everyone at least was supposed to abide by</p> <p>2 it, correct?</p> <p>3 A. Correct.</p> <p>4 Q. Okay. And you've now testified that</p> <p>5 more often than not at least with respect to</p> <p>6 some customers, you didn't abide by those</p> <p>7 prices, correct?</p> <p>8 A. To the other farms. Not to, you know,</p> <p>9 direct customers to the sideway sales.</p> <p>10 Q. Right, okay. Did you ever notify the</p> <p>11 EMMC itself or any members of the EMMC to say,</p> <p>12 hey, I just want you know, I'm cheating on the</p> <p>13 side with the sideway sales. I'm not abiding</p> <p>14 by the EMMC pricing.</p> <p>15 Did you ever tell anybody that?</p> <p>16 MS. ALBANI: Objection to the</p> <p>17 word "cheating" and it's been now asked and</p> <p>18 answer three times.</p> <p>19 MR. LIVINGSTON: It hasn't</p> <p>20 been answered and there's nothing wrong with</p> <p>21 the word "cheating". I think the witness</p> <p>22 knows what that means.</p> <p>23 MS. ALBANI: Objection.</p> <p>24 BY MR. LIVINGSTON:</p> <p>25 Q. Do you have any problems with the word</p>
<p style="text-align: right;">303</p> <p>1 non-EMMC prices?</p> <p>2 A. I let them know that the EMMCGA is</p> <p>3 something that I was against and that is not</p> <p>4 right. You cannot take these customers from</p> <p>5 me. It wasn't fair. It wasn't fair. So, I</p> <p>6 voiced my opinion, yes, I did several times.</p> <p>7 Q. You said not take my customers away.</p> <p>8 I'm not sure I understand you. I'm asking you</p> <p>9 whether or not you came into a meeting and</p> <p>10 ever said, hey, guys, I just want you to know</p> <p>11 that I don't agree with the EMMC prices and</p> <p>12 I'm not selling at EMMC prices and all these</p> <p>13 customers I have over here I'm not selling at</p> <p>14 EMMC prices.</p> <p>15 Did you ever tell them that?</p> <p>16 A. I tried my best to explain to them that,</p> <p>17 yes, you know, I can't abide by this, I'm</p> <p>18 sorry. It would damage my company. It would</p> <p>19 make me go out of business.</p> <p>20 Q. I know you voiced your objection to the</p> <p>21 policy, but you understood that the policy</p> <p>22 was, despite your objection, adopted by the</p> <p>23 EMMC, correct?</p> <p>24 A. Correct.</p> <p>25 Q. Okay. Now, it's a policy of the EMMC</p>	<p style="text-align: right;">305</p> <p>1 "cheating", do you know what that means? Not</p> <p>2 following EMMC prices even though you had</p> <p>3 agreed -- or even though the organization had</p> <p>4 adopted them?</p> <p>5 MS. ALBANI: Object to the</p> <p>6 word "cheating".</p> <p>7 MR. LIVINGSTON: All right.</p> <p>8 Your counsel -- hopefully, are you done with</p> <p>9 your objection now?</p> <p>10 Anything more you want to</p> <p>11 add?</p> <p>12 MS. ALBANI: If you ask</p> <p>13 another objectionable question.</p> <p>14 MR. LIVINGSTON: Is there any</p> <p>15 other word in that question that you have a</p> <p>16 problem with?</p> <p>17 MS. ALBANI: Why don't we</p> <p>18 just move on.</p> <p>19 THE WITNESS: It wasn't</p> <p>20 cheating, it was a lesser grade product. It</p> <p>21 was a food service grade, you know what I'm</p> <p>22 saying?</p> <p>23 BY MR. LIVINGSTON:</p> <p>24 Q. Well, are you saying that there wasn't</p> <p>25 an EMMC price that applied to those</p>

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EXHIBIT "B"

1 IN THE UNITED STATES DISTRICT COURT
2
3 FOR THE EASTERN DISTRICT OF PENNSYLVANIA

4 IN RE: MUSHROOM : MASTER FILE NO.
5 :
6 DIRECT PURCHASER : GD 06-0620
7 :
8 ANTITRUST LITIGATION :

9 * * *

10 JANUARY 20, 2012

11 * * *

12 Videotaped deposition of CHARLES J.
13 CIARROCCHI, JR., taken at the law offices of
14 Hangley, Aronchick, Segal, Pudlin & Schiller,
15 One Logan Square, 27th Floor, Philadelphia,
16 Pennsylvania, commencing at 9:37 a.m. before
17 Debbie Leonard, Registered Diplomat
18 Reporter, Certified Realtime Reporter.
19
20
21
22
23
24
25

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1 CHARLES J. CIARROCCHI, JR.
2 1:55 p.m.)
3 * * *
4 THE VIDEOGRAPHER: The time is
5 1:55. We are back on the video
6 record.
7 MR. FISHER: Mr. Ciarrocchi, I
8 have no further questions.
9 MR. DESTEFANO: I just have a
10 couple of questions real quick, if
11 that's okay.
12 THE WITNESS: Yes.
13 MR. DESTEFANO: All right.
14 * * *
15 EXAMINATION
16 * * *
17 BY MR. DESTEFANO:
18 Q. There was a lot of discussion
19 about the EMMC's minimum pricing policy, but
20 let me ask you this. Was that policy
21 eventually abandoned?
22 A. Yes.
23 Q. When?
24 A. I can't remember exactly when,
25 but it was abandoned.

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1 CHARLES J. CIARROCCHI, JR.
2 Q. Why was it abandoned?
3 A. Because it was not working, and
4 it was unenforceable.
5 Q. The request for documents that
6 Mr. Fisher asked you about --
7 A. Yes.
8 Q. -- did you personally look for
9 documents that were requested by the
10 plaintiffs in this case?
11 A. I personally did not look for
12 them --
13 Q. Okay.
14 A. -- but I did give them --
15 Q. Okay. Second question. Do you
16 know if other people in your company, Modern
17 Mushroom, and C&C Carriage, which is a
18 subsidiary, made a search for those
19 documents?
20 A. Yes.
21 Q. Okay. Who -- who was it? And
22 it may have been more than one, but who was
23 it that -- that you recall making the search?
24 A. Ben Lazar and Jack Reitnauer.
25 MR. DESTEFANO: Okay. Scott,

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1 CHARLES J. CIARROCCHI, JR.
2 can you just give me two minutes --
3 MR. FISHER: Sure.
4 MR. DESTEFANO: -- to confer
5 with Terri --
6 MR. FISHER: Sure.
7 MR. DESTEFANO: -- who's the
8 brains of this outfit.
9 THE VIDEOGRAPHER: The time is
10 1:57. We're going off the video
11 record.
12 * * *
13 (Recess from 1:57 p.m. to
14 2:03 p.m.)
15 * * *
16 THE VIDEOGRAPHER: The time
17 2:03. We are back on the video
18 record.
19 MR. DESTEFANO: We have no
20 further questions of this witness at
21 this time, but we would like to read
22 and sign the deposition -- or have the
23 opportunity to read and sign the
24 deposition.
25 MR. FISHER: That's fine.

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1 CHARLES J. CIARROCCHI, JR.
2 MR. DESTEFANO: Okay. Thank
3 you. No, we don't need it for the
4 other deposition. Thank you.
5 THE VIDEOGRAPHER: The time is
6 2:03, and this concludes the
7 deposition.
8 * * *
9 (Witness excused.)
10 * * *
11 (Off the record at 2:03 p.m.)
12 * * *
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1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE EASTERN DISTRICT OF PENNSYLVANIA

3 IN RE: MUSHROOM : MASTER FILE NO.
4 DIRECT PURCHASER : GD 06-0620
5 ANTITRUST LITIGATION :

6 * * *

7 MARCH 8, 2012

8 * * *

9
10 Videotaped deposition of WILHELM MEYA,
11 taken at the law offices of Hangle, &
12 Aronchick, Segal, Pudlin & Schiller, One
13 Logan Square, 27th Floor, Philadelphia,
14 Pennsylvania, commencing at 9:43 a.m. before
15 Debbie Leonard, Registered Diplomate
16 Reporter, Certified Realtime Reporter.

<p style="text-align: right;">Page 210</p> <p>1 WILHELM MEYA</p> <p>2 October of 2000 -- and sometime prior to that</p> <p>3 shut down some of its United States farms, to</p> <p>4 the best of your knowledge, did Moneys</p> <p>5 continue to grow mushrooms in Canada at that</p> <p>6 time?</p> <p>7 A. Yes.</p> <p>8 Q. Okay. Do you know for</p> <p>9 approximately how long Moneys continued --</p> <p>10 well, is Moneys' Canadian growing operation</p> <p>11 still in business today, to the best of your</p> <p>12 knowledge?</p> <p>13 A. I couldn't answer that.</p> <p>14 Q. Okay.</p> <p>15 A. I only know the president, they</p> <p>16 fired.</p> <p>17 Q. Okay. Do you know for how long</p> <p>18 Moneys continued its Canadian growing</p> <p>19 operation after 2000?</p> <p>20 A. No, I don't know.</p> <p>21 MR. LANDAU: You're meaning</p> <p>22 Canada, Bill?</p> <p>23 MR. DESTEFANO: In Canada. I'm</p> <p>24 sorry.</p> <p>25 MR. LANDAU: Okay.</p>	<p style="text-align: right;">Page 212</p> <p>1 WILHELM MEYA</p> <p>2 THE VIDEOGRAPHER: The time is</p> <p>3 3:05. We're going off the video</p> <p>4 record. This concludes videotape</p> <p>5 number 3.</p> <p>6 * * *</p> <p>7 (Recess from 3:05 p.m. to</p> <p>8 3:07 p.m.)</p> <p>9 * * *</p> <p>10 THE VIDEOGRAPHER: The time is</p> <p>11 3:07. We're back on the video record.</p> <p>12 This begins tape 4 of the videotaped</p> <p>13 deposition of Wilhelm Meya.</p> <p>14 BY MR. DESTEFANO:</p> <p>15 Q. Mr. Meya, so -- so I'm clear,</p> <p>16 Franklin exited the mushroom business except</p> <p>17 for a very small amount of high-end specialty</p> <p>18 organic mushrooms, shiitakes, maitakes, in</p> <p>19 2006?</p> <p>20 A. We close down the main farm</p> <p>21 2006, yes.</p> <p>22 Q. Okay. Do you remember what</p> <p>23 month it was --</p> <p>24 A. June.</p> <p>25 Q. -- in 2006? June?</p>
<p style="text-align: right;">Page 211</p> <p>1 WILHELM MEYA</p> <p>2 MR. DESTEFANO: In Canada.</p> <p>3 BY MR. DESTEFANO:</p> <p>4 Q. Did Moneys, after its</p> <p>5 bankruptcy in late 2000, continue to grow</p> <p>6 mushrooms at midwestern farms, farms located</p> <p>7 in the Midwest?</p> <p>8 A. I don't think so.</p> <p>9 Q. Okay. Do you recall another</p> <p>10 Canadian grower by the name of Highline?</p> <p>11 A. Yes.</p> <p>12 Q. Was Highline a large producer</p> <p>13 of mushrooms?</p> <p>14 A. The second larger in Canada.</p> <p>15 Q. When the people at Stop & Shop</p> <p>16 told you that if you raised your price, they</p> <p>17 would just go to a Canadian supplier, do you</p> <p>18 know which Canadian supplier they were</p> <p>19 talking about?</p> <p>20 A. They were talking about it, but</p> <p>21 they would shop around.</p> <p>22 THE VIDEOGRAPHER: Counselor,</p> <p>23 two minutes left.</p> <p>24 MR. DESTEFANO: Do you want to</p> <p>25 change it now? Go ahead.</p>	<p style="text-align: right;">Page 213</p> <p>1 WILHELM MEYA</p> <p>2 Did the main farming operation</p> <p>3 of Franklin that you closed down in June of</p> <p>4 '06 make money in '06?</p> <p>5 A. No.</p> <p>6 Q. Was there a loss?</p> <p>7 A. Yes.</p> <p>8 Q. How about '05?</p> <p>9 A. There was also a loss.</p> <p>10 Q. How about '04?</p> <p>11 A. There was also a loss.</p> <p>12 Q. Was -- were mushrooms -- fresh</p> <p>13 mushrooms a highly competitive business</p> <p>14 between 2000 and the time you closed down in</p> <p>15 2006?</p> <p>16 A. Very competitive.</p> <p>17 Q. And I believe you answered one</p> <p>18 or more of Mr. Landau's questions by</p> <p>19 commenting or saying that the -- EMMC's</p> <p>20 minimum pricing policy just simply didn't</p> <p>21 work. Would that be correct?</p> <p>22 A. That's correct.</p> <p>23 Q. Can you tell us why?</p> <p>24 A. As I stated before, we had to</p> <p>25 hold our customer base, if you want to stay</p>

<p style="text-align: right;">Page 214</p> <p>1 WILHELM MEYA</p> <p>2 in business, the best way you could. And</p> <p>3 there were EMMC members, too, plus outside of</p> <p>4 EMMC member, were trying to get market share.</p> <p>5 So it was a continuous struggle always,</p> <p>6 holding onto customer and going back and</p> <p>7 forth. You lose them until you lowered your</p> <p>8 price. Then you got them back. And it was</p> <p>9 just -- for example, look at Franklin Farms.</p> <p>10 Lost about 3 to 4 million in customers.</p> <p>11 Q. When -- were all of your big</p> <p>12 customers individually negotiated prices?</p> <p>13 A. Yes.</p> <p>14 MR. LANDAU: Object to the</p> <p>15 form.</p> <p>16 BY MR. DESTEFANO:</p> <p>17 Q. And let me ask you this. Was</p> <p>18 the starting point in your pricing somewhere</p> <p>19 in the vicinity of the EMMC minimums?</p> <p>20 A. Yes. I think in certain</p> <p>21 instances higher than the EMMC.</p> <p>22 Q. Okay. And was it more common</p> <p>23 to wind up below or above with respect to</p> <p>24 your big customers?</p> <p>25 MR. LANDAU: Object to the</p>	<p style="text-align: right;">Page 216</p> <p>1 WILHELM MEYA</p> <p>2 3:13, and that concludes the</p> <p>3 videotaped deposition of Wilhelm Meya.</p> <p>4 * * *</p> <p>5 (Witness excused.)</p> <p>6 * * *</p> <p>7 (Off the record at 3:13 p.m.)</p> <p>8 * * *</p> <p>9</p> <p>10</p> <p>11</p> <p>12 WILHELM MEYA</p> <p>13 Subscribed and sworn to before me</p> <p>14 this _____ day of _____, 2012.</p> <p>15</p> <p>16</p> <p>17 Notary Public</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>
<p style="text-align: right;">Page 215</p> <p>1 WILHELM MEYA</p> <p>2 form.</p> <p>3 THE WITNESS: I would think if</p> <p>4 you calculate in the volume discount,</p> <p>5 it was below minimum pricing.</p> <p>6 BY MR. DESTEFANO:</p> <p>7 Q. And how about the promotional</p> <p>8 allowances?</p> <p>9 A. They might be equal or covered,</p> <p>10 you know. It was same pricing.</p> <p>11 Q. Did Creekside go out of</p> <p>12 business, to the best of your recollection?</p> <p>13 A. To my understanding, yes.</p> <p>14 Q. Was that before or after</p> <p>15 Franklin shut down its main growing</p> <p>16 operation?</p> <p>17 A. After Franklin shut down.</p> <p>18 Q. How about Quincy in Florida?</p> <p>19 A. Similar. Little later.</p> <p>20 MR. DESTEFANO: That's all I</p> <p>21 have, Kevin.</p> <p>22 MR. LANDAU: Okay. We have</p> <p>23 nothing further. Thank you.</p> <p>24 THE WITNESS: Thank you.</p> <p>25 THE VIDEOGRAPHER: The time is</p>	<p style="text-align: right;">Page 217</p> <p>1 WILHELM MEYA</p> <p>2 CERTIFICATE</p> <p>3</p> <p>4 I do hereby certify that I am a Notary</p> <p>5 Public in good standing, that the aforesaid</p> <p>6 testimony was taken before me, pursuant to</p> <p>7 notice, at the time and place indicated; that</p> <p>8 said deponent was by me duly sworn to tell</p> <p>9 the truth, the whole truth, and nothing but</p> <p>10 the truth; that the testimony of said</p> <p>11 deponent was correctly recorded in machine</p> <p>12 shorthand by me and thereafter transcribed</p> <p>13 under my supervision with computer-aided</p> <p>14 transcription; that the deposition is a true</p> <p>15 and correct record of the testimony given by</p> <p>16 the witness; and that I am neither of counsel</p> <p>17 nor kin to any party in said action, nor</p> <p>18 interested in the outcome thereof.</p> <p>19 WITNESS my hand and official seal this</p> <p>20 12th day of March, 2012.</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p> <p>Debbie Leonard, RDR, CRR</p> <p>Notary Public</p>

1 IN THE UNITED STATES DISTRICT COURT
2
3 FOR THE EASTERN DISTRICT OF PENNSYLVANIA

4 IN RE: MUSHROOM : MASTER FILE NO.
5 :
6 DIRECT PURCHASER : GD 06-0620
7 ANTITRUST LITIGATION :

8 * * *

9 FEBRUARY 23, 2012

10 * * *

11 Videotaped deposition of STEVEN
12 PHILLIPS, taken at the law offices of
13 Hangley, Aronchick, Segal, Pudlin & Schiller,
14 One Logan Square, 27th Floor, Philadelphia,
15 Pennsylvania, commencing at 9:54 a.m. before
16 Debbie Leonard, Registered Diplomate
17 Reporter, Certified Realtime Reporter.
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<p style="text-align: right;">Page 202</p> <p>1 STEVEN PHILLIPS</p> <p>2 own members couldn't expand.</p> <p>3 So what happened was, as those</p> <p>4 mushroom plants went out of business,</p> <p>5 eventually supply and demand -- there were</p> <p>6 too many mushrooms. Those mushroom farms</p> <p>7 that we bought, those people went out of</p> <p>8 business because of oversupply. Things</p> <p>9 balanced out.</p> <p>10 But as soon as things balanced</p> <p>11 out, you had the local growers in</p> <p>12 Pennsylvania who grow in beds -- you</p> <p>13 typically have 24 beds in a mushroom house.</p> <p>14 They all decided to go seven beds high in the</p> <p>15 existing mushroom houses.</p> <p>16 So within a year and a half,</p> <p>17 there was probably another 10 percent more</p> <p>18 mushrooms grown just in Kennett Square,</p> <p>19 without building any additional mushroom</p> <p>20 houses.</p> <p>21 So without that part being --</p> <p>22 you know, which nobody would agree to,</p> <p>23 because everyone wanted to take advantage of</p> <p>24 a shortage of mushrooms, and so that's</p> <p>25 probably why it didn't work out in the long</p>	<p style="text-align: right;">Page 204</p> <p>1 STEVEN PHILLIPS</p> <p>2 Q. Did other members besides</p> <p>3 Cutone and Basciani resign shortly after</p> <p>4 2001?</p> <p>5 A. Yes.</p> <p>6 Q. So between 2001 and 2005, was</p> <p>7 there a net gain in membership or a net loss</p> <p>8 in membership of the EMMC?</p> <p>9 A. As far as I recall, net loss.</p> <p>10 Q. Was the EMMC's minimum pricing</p> <p>11 policy successful over the long term in</p> <p>12 stabilizing or increasing prices for fresh</p> <p>13 mushrooms in the marketplace?</p> <p>14 A. There was -- there was a</p> <p>15 short-term -- there was a short-term gain.</p> <p>16 But, like I said, people expanded pretty --</p> <p>17 pretty rapidly after that. And so net, no.</p> <p>18 Well, I mean, short-term. Then</p> <p>19 price went down. And I think -- if you look</p> <p>20 at the big picture, I think our -- as an</p> <p>21 industry, our biggest price increase we've</p> <p>22 had in the last ten years came in 2006 or</p> <p>23 2007, after there was no -- because things</p> <p>24 got bad enough, people went out of business</p> <p>25 again, and then the price goes up. I mean,</p>
<p style="text-align: right;">Page 203</p> <p>1 STEVEN PHILLIPS</p> <p>2 run.</p> <p>3 Q. Okay. Let me ask you this.</p> <p>4 From its inception in very early 2001, did</p> <p>5 the EMMC gain members or lose members over</p> <p>6 the ensuing five to eight years?</p> <p>7 A. Lost members.</p> <p>8 Q. Okay. Was there once a member</p> <p>9 by the name of Cutone?</p> <p>10 MS. CAIN-MANNIX: Objection.</p> <p>11 Form.</p> <p>12 Go ahead.</p> <p>13 THE WITNESS: Yes.</p> <p>14 BY MR. DESTEFANO:</p> <p>15 Q. Did he resign fairly shortly</p> <p>16 after he joined?</p> <p>17 A. Yes.</p> <p>18 Q. Another member by the name of</p> <p>19 Basciani. Did Basciani resign?</p> <p>20 A. He was the biggest, yeah.</p> <p>21 MS. CAIN-MANNIX: I'm objecting</p> <p>22 to this line as leading. Go ahead.</p> <p>23 MR. DESTEFANO: I don't think</p> <p>24 it's leading.</p> <p>25 BY MR. DESTEFANO:</p>	<p style="text-align: right;">Page 205</p> <p>1 STEVEN PHILLIPS</p> <p>2 that's typically what happens.</p> <p>3 Q. Was the minimum pricing policy</p> <p>4 abandoned or eliminated in 2005?</p> <p>5 A. What's the difference?</p> <p>6 Q. Well, I was using them as</p> <p>7 synonyms. Was it abandoned in 2005?</p> <p>8 A. As far as I recall.</p> <p>9 Q. And why was it abandoned?</p> <p>10 A. Too many people cheating. And</p> <p>11 competition. Like I said, enough people --</p> <p>12 enough people got out that -- they got out</p> <p>13 because they knew they could probably do</p> <p>14 better out than in.</p> <p>15 Q. When you say there was a</p> <p>16 short-term increase, are you talking about</p> <p>17 average prices or are you talking about</p> <p>18 prices in every case to every customer?</p> <p>19 A. No, obviously not in every</p> <p>20 case, because lots of times you couldn't</p> <p>21 raise prices. But, you know, there was a --</p> <p>22 I mean, there was an increase in pricing in</p> <p>23 general.</p> <p>24 Q. Do you recall any serious</p> <p>25 effort by the EMMC to enforce its minimum</p>

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE EASTERN DISTRICT OF PENNSYLVANIA

3 IN RE: MUSHROOM : MASTER FILE NO.
4 DIRECT PURCHASER : GD 06-0620
5 ANTITRUST LITIGATION :

6 * * *

7 JANUARY 19, 2012

8 * * *

9
10 Videotaped deposition of MATTHEW
11 MARSON, taken at the law offices of Hangle, &
12 Aronchick, Segal, Pudlin & Schiller, One
13 Logan Square, 27th Floor, Philadelphia,
14 Pennsylvania, commencing at 10:02 a.m. before
15 Debbie Leonard, Registered Diplomat
16 Reporter, Certified Realtime Reporter.

<p style="text-align: right;">Page 90</p> <p>1 MATTHEW MARSON</p> <p>2 Q. Okay. Let's take a look at</p> <p>3 EMMC-DOJ-00324 on this document. That's</p> <p>4 page 16 of the actual document.</p> <p>5 Okay. Again, I'll direct you</p> <p>6 to subheading B. And it says, "EMMC's</p> <p>7 Strengths." Do you see that?</p> <p>8 A. Yes.</p> <p>9 Q. And it says, "Primary</p> <p>10 Strengths." And the first bullet is, "The</p> <p>11 ability to stabilize-maximize prices."</p> <p>12 A. Yes.</p> <p>13 Q. And next to that, in</p> <p>14 parentheses, there's the number 30?</p> <p>15 A. Yeah.</p> <p>16 Q. Okay. And then if you want to</p> <p>17 just turn the page to 00325, just the next</p> <p>18 page over --</p> <p>19 A. I don't know what that 30</p> <p>20 means, though.</p> <p>21 Q. Okay. Do you think the 30</p> <p>22 could be the number of people who attended</p> <p>23 the meeting that agreed with that premise?</p> <p>24 A. I don't recall.</p> <p>25 Q. Okay.</p>	<p style="text-align: right;">Page 92</p> <p>1 MATTHEW MARSON</p> <p>2 MR. GERSTEIN: 16A.</p> <p>3 BY MR. GERSTEIN:</p> <p>4 Q. Mr. Marson, have you ever seen</p> <p>5 this document before?</p> <p>6 A. No.</p> <p>7 Q. Okay. Do you have -- or do you</p> <p>8 see among the present that the first one is</p> <p>9 Louis Marson?</p> <p>10 A. Yes.</p> <p>11 Q. Do you think that's referring</p> <p>12 to your father?</p> <p>13 A. Yes.</p> <p>14 Q. Okay. Do you know who prepared</p> <p>15 the minutes for the EMMC?</p> <p>16 A. No, I do not.</p> <p>17 Q. I believe you testified earlier</p> <p>18 that you knew that meeting minutes were</p> <p>19 prepared.</p> <p>20 A. Yes.</p> <p>21 Q. Okay. Did you know at the</p> <p>22 time, in 2001, that meeting minutes were</p> <p>23 being prepared contemporaneous with the</p> <p>24 meeting?</p> <p>25 A. I -- I don't recall that. I</p>
<p style="text-align: right;">Page 91</p> <p>1 MATTHEW MARSON</p> <p>2 A. I do not know what these</p> <p>3 numbers mean.</p> <p>4 Q. Okay. I'll direct you to</p> <p>5 subheading C on 00325. And it says, "EMMC's</p> <p>6 Weaknesses." And do you see the subheading</p> <p>7 "Other Weaknesses"?</p> <p>8 A. Yes.</p> <p>9 Q. And way down at the bottom, it</p> <p>10 says, "We lack discipline"?</p> <p>11 A. Yes.</p> <p>12 Q. And the number in parentheses</p> <p>13 is 2?</p> <p>14 A. (No audible response.)</p> <p>15 Q. Okay.</p> <p>16 THE REPORTER: I didn't get an</p> <p>17 answer.</p> <p>18 THE WITNESS: Yes.</p> <p>19 MR. GERSTEIN: Okay. I'm going</p> <p>20 to mark in EMMC-DOJ-00222 through 225.</p> <p>21 This is a general meeting minutes,</p> <p>22 Eastern Mushroom Marketing</p> <p>23 Cooperative, April 13, 2001. And it's</p> <p>24 been previously marked Modern-16A.</p> <p>25 MR. DESTEFANO: 16A?</p>	<p style="text-align: right;">Page 93</p> <p>1 MATTHEW MARSON</p> <p>2 mean, I think they were being prepared, but I</p> <p>3 don't know by who --</p> <p>4 Q. Okay.</p> <p>5 A. -- or when or what meetings.</p> <p>6 But --</p> <p>7 Q. Okay. Okay. I'll direct your</p> <p>8 attention to 00224, which is the third page</p> <p>9 of these meeting minutes. And at the top, it</p> <p>10 says, "New Business."</p> <p>11 A. Okay.</p> <p>12 Q. And it says, "Penalties for</p> <p>13 Non-Compliance." Then it says,</p> <p>14 "Non-compliant issues are to be sent to the</p> <p>15 Board along with documentation of violation."</p> <p>16 "The non-compliant party will</p> <p>17 be notified of the violation. The accuser</p> <p>18 and the alleged offender will have 5 days to</p> <p>19 resolve the issue."</p> <p>20 "If the issue is not resolved</p> <p>21 within 5 days a grievance will be filed with</p> <p>22 the Board."</p> <p>23 "Within 10 days of the</p> <p>24 grievance being filed, both parties will meet</p> <p>25 with the Executive Committee for mediation."</p>

24 (Pages 90 - 93)

<p style="text-align: right;">Page 94</p> <p>1 MATTHEW MARSON</p> <p>2 "If resolution is not reached</p> <p>3 after mediation the Board will render a</p> <p>4 decision."</p> <p>5 Do you recall in April of 2001</p> <p>6 there being a dispute resolution system like</p> <p>7 this in place for EMMC members?</p> <p>8 A. I can't recall that one.</p> <p>9 Q. Okay. Did Greenwood ever have</p> <p>10 a dispute with another EMMC member about</p> <p>11 pricing?</p> <p>12 A. Depends what time period.</p> <p>13 Q. Well -- okay. In -- in 2001,</p> <p>14 let's say.</p> <p>15 A. I can't recall. That was ten</p> <p>16 years ago.</p> <p>17 Q. Okay. Let me direct you</p> <p>18 further down the page --</p> <p>19 A. Okay.</p> <p>20 Q. -- where it says, "Pricing/</p> <p>21 Member Issues."</p> <p>22 And it says, "Cardile/Buona --</p> <p>23 It was decided that there is no violation on</p> <p>24 the part of Buona until proof is presented."</p> <p>25 A. Okay.</p>	<p style="text-align: right;">Page 96</p> <p>1 MATTHEW MARSON</p> <p>2 unaccounted for that when -- even though</p> <p>3 members shared an account, they would always</p> <p>4 have outside pressure coming in at cheaper</p> <p>5 numbers, which made these disputes happen.</p> <p>6 Q. Okay. And you would -- in the</p> <p>7 case that there was a dispute, would the</p> <p>8 member raise it amongst the membership?</p> <p>9 A. Raise what?</p> <p>10 Q. Raise the -- bring the dispute</p> <p>11 to light amongst the membership. If there</p> <p>12 was a disagreement between two members, would</p> <p>13 they -- in the general meeting, did they just</p> <p>14 explain the dispute to the membership?</p> <p>15 A. Not all the time, no.</p> <p>16 Q. Okay.</p> <p>17 A. This is a very fast-paced</p> <p>18 industry. Sometimes you don't have time to</p> <p>19 wait for the meeting to make your decision</p> <p>20 with all the outside pounds coming in and</p> <p>21 forcing the price down.</p> <p>22 Q. Okay. But in certain</p> <p>23 instances, they did, right?</p> <p>24 A. Yes.</p> <p>25 MR. GERSTEIN: Okay. Let's</p>
<p style="text-align: right;">Page 95</p> <p>1 MATTHEW MARSON</p> <p>2 Q. And then way at the bottom, it</p> <p>3 says, "Georgio Contracts -- It is agreed that</p> <p>4 Georgio is not in violation with the</p> <p>5 contracts signed before the cut-off date."</p> <p>6 Do you recall ever having</p> <p>7 attended meetings where these kinds of issues</p> <p>8 were aired --</p> <p>9 A. Yes.</p> <p>10 Q. -- among the members?</p> <p>11 Okay. Now, when an issue like</p> <p>12 this came up, how did the members resolve</p> <p>13 dispute?</p> <p>14 A. With pricing?</p> <p>15 Q. Well, say an EMMC member like</p> <p>16 Cardile, you know, has a complaint about</p> <p>17 another EMMC member and their pricing and</p> <p>18 they raise it with the EMMC in a general</p> <p>19 meeting, as it happened here.</p> <p>20 A. Okay.</p> <p>21 Q. How would -- what would the</p> <p>22 membership do?</p> <p>23 A. That would depend, because</p> <p>24 there's so many -- there were so many</p> <p>25 non-members and so many pounds that were</p>	<p style="text-align: right;">Page 97</p> <p>1 MATTHEW MARSON</p> <p>2 mark in June 5, 2001 --</p> <p>3 Okay. These are June 5, 2001,</p> <p>4 general meeting minutes. The Bates</p> <p>5 stamp is EMMC-DOJ-201 through 203, and</p> <p>6 this has been previously marked as</p> <p>7 Oakshire-19.</p> <p>8 BY MR. GERSTEIN:</p> <p>9 Q. Mr. Marson, have you ever seen</p> <p>10 this document before?</p> <p>11 A. Documents like this one. I</p> <p>12 don't know about this exact one.</p> <p>13 Q. Okay. So you understand that</p> <p>14 these are EMMC meeting minutes?</p> <p>15 A. Yeah.</p> <p>16 Q. Okay. On the "In attendance"</p> <p>17 list, do you see your name there amongst the</p> <p>18 distribution?</p> <p>19 A. Yes, I do.</p> <p>20 Q. Okay. I direct you to</p> <p>21 EMMC-DOJ-00203. If you look down at number</p> <p>22 13, it says, "Market Issues."</p> <p>23 A. Okay.</p> <p>24 Q. And then there's four of them.</p> <p>25 "Southmill/Cardile -- issue</p>

25 (Pages 94 - 97)

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Opposition to Motion for Sanctions was served on counsel for all parties to these consolidated civil actions by filing same pursuant to the ecf. filing system of the United States District Court for the Eastern District of Pennsylvania.

Dated: April 25, 2012

/s/ William A. DeStefano